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No. 02-0516

IN THE

Supreme Court of the United States

JENNIFER GRATZ AND PATRICK HAMACHER,

Petitioners,

v.

LEE BOLLINGER, ET AL.,

Respondents.

ON A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AMICUS CURIAE BRIEF OF NORTHEASTERN UNIVERSITY SUPPORTING THE RESPONDENTS

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INTEREST OF *AMICUS CURIAE*

"Preparing students to welcome – and excel in – a world characterized by diversity is among our most critical missions and one of our strongest commitments."

Richard M. Freeland, Northeastern University Annual Report, 1999-2000.

Northeastern University is a private university with its main campus in Boston, Massachusetts.[1] Northeastern has approximately 16,200 full-time and 6,300 part-time students participating in a comprehensive range of undergraduate and graduate degree programs.

The centerpiece of Northeastern's programs is the cooperative education system, in which a student's academic studies are interspersed with periods of employment related to the student's chosen field. Northeastern is a world leader in cooperative education, also referred to as practice-oriented education.

A racially and ethnically diverse student body is essential to Northeastern University's educational mission of practice-oriented education. Employers in the urban community

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[1] The parties have filed letters with the Clerk, pursuant to Supreme Court Rule 37.3, which consent to the filing of *amicus* briefs in support of either party. This brief was not authored in whole or in part by counsel for any party, and no person or entity other than the *amicus curiae* made a monetary contribution to the preparation or submission of this brief.

and elsewhere, both public and private, demand an educated, diverse workforce reflective of society as a whole. They also need to hire workers who have the skills to thrive in an environment that is diverse in both the workplace in which they perform and in the marketplace that they are employed to serve. Northeastern's practice-oriented educational programs meet both aspects of this need. Northeastern produces qualified minority candidates for the professions and other occupations, and it equips its minority and non-minority students alike with the leadership skills and other attributes that flow from learning in a diverse educational community.

Northeastern University, as a leader in professional education, cannot meet the needs of employers, nor can it appropriately prepare its students to thrive in the workplace, if it is forced to forfeit its ability to admit, retain, educate and graduate a diverse student body. The resolution of the central question pending before the Court – whether the appropriately tailored use of racial and ethnic preferences in student admissions is lawful – thus is of vital interest to Northeastern; to the thousands of Northeastern students who currently benefit from the diversity of its student body; and to the thousands of employers in the greater Boston area and elsewhere who look to Northeastern to provide diverse graduates who are well-prepared to assimilate in and meet the demands of a diverse marketplace.

SUMMARY OF ARGUMENT

Preparing students to serve the needs of the professions and other occupations has been a core mission for Northeastern University since its inception. As a practice-oriented university, Northeastern is particularly attuned to the needs of the many different occupations that its students pursue, not only upon graduation, but also during the cooperative employment internships in which many Northeastern students participate before graduation. Northeastern hears loud and clear the call of employers in the public and private sectors for employees who are diverse in race and ethnicity, equipped to thrive in a diverse workforce and able to serve a diverse community of customers.

One example of an employer that looks to Northeastern University to help provide it with qualified minority candidates, as well as candidates who have benefitted from being educated within a diverse student body, is the City of Boston Police Department. The Department needs racial diversity within its ranks for several compelling reasons. The Police Department must reflect the community at large in order to maximize the effectiveness of its community policing strategy. It also has needed to increase minority hiring in order to remedy the effects of past discrimination by the Department. Northeastern's College of Criminal Justice, which has its origins in the training needs of the Boston Police Department, has played a central role in supplying the Department with qualified minority candidates.

The Boston Police Department is just one illustration of an employer that needs to increase minority hiring not only to reap the functional benefits of a diverse workforce, but also to comply with existing court orders – and to avoid new ones – resulting from the employer's past discrimination. Employers like the Boston Police Department have a compelling need for qualified minority applicants – a need that cannot be filled unless universities first admit, retain, prepare, and graduate minority students who are ready to become those qualified applicants.

Racial and ethnic diversity is a compelling interest for Northeastern University not only because it is essential to meeting the needs of employers, but also because diversity is essential to the educational experience that it is Northeastern's mission to provide. A diverse student body is paramount to the vibrant exchange of information, ideas and viewpoints that is the very essence of higher education. For these reasons, diversity at Northeastern must be understood as imperative to the Northeastern educational experience itself.

This Court long has recognized the vital role of education in a free society, and the constitutional importance of academic freedom in the university. For these principles to have meaning, the individual university must be free to define its own mission and determine how to achieve that mission. Northeastern has defined its mission as a world leader in practice-oriented education, and has determined that diversity is essential to that mission. Northeastern must not

lose the ability to select its student body bearing in mind this educational mission.

ARGUMENT

I. NORTHEASTERN UNIVERSITY CANNOT FULFILL ITS EDUCATIONAL MISSION WITHOUT A DIVERSE STUDENT BODY.

Attaining diversity in higher education is a compelling interest, which is permissible under the Constitution and Title VI of the Civil Rights Act of 1964. *Regents of the Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 311-14 (1978). *See also Metro Broadcasting, Inc.* v. *FCC*, 497 U.S. 547, 568 (1990)("a 'diverse student body' ... is a 'constitutionally permissible goal' on which a race-conscious university admissions program may be predicated")(quoting *Bakke*, 438 U.S. at 311-12 (Powell, J.)), *overruled on other grounds*, *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200 (1995); *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 286 (1986)(O'Connor, J., concurring)("a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest")(citing *Bakke*, 438 U.S. at 311-15 (Powell, J.)).

Justice Powell, in his controlling opinion in *Bakke*, identified two primary reasons why achieving racial diversity in higher education is a compelling interest: (1) diversity promotes better learning, 438 U.S. at 312 ("[t]he atmosphere of 'speculation, experiment and creation' – so essential to the quality of higher education – is

widely believed to be promoted by a diverse student body")(quoting William Bowen, *Admissions and the Relevance of Race*, Princeton Alumni Weekly 7, 9 (Sept. 26, 1977)); and (2) it fosters the values and skills that will make students better leaders after they leave the academic environment, *id.* at 313 ("the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples")(quoting *Keyishian* v. *Board of Regents*, 385 U.S. 589, 603 (1967)).

Achieving diversity is a compelling interest for Northeastern University because a diverse student body is essential to the practice-oriented education that it is Northeastern's mission to provide.

A. Diversity Is Essential to Northeastern University's Mission of Practice-Oriented Education.

Derek Bok, the former president of Harvard University and former dean of Harvard's law school, correctly observes that one reason many universities consider race in their admissions policies is the universities' "established tradition of trying to serve the needs of important professions and occupations in the society." Derek Bok, *The Uncertain Future of Race-Sensitive Admissions* (Revised draft, Jan. 20, 2003), http://www.nacua.org/documents/Uncertain_Future_of_Race_Sensitive_Admissions_Revised.pdf, at 3 (hereafter, "Bok"). For Northeastern University, preparing students to serve the needs of the professions and other occupations is not

merely an "established tradition." It is has been a core mission for Northeastern from the start.

1. Northeastern University Fulfills its Educational Mission by Preparing its Students for Success in the Workplace.

Northeastern University was founded in Boston at the end of the 19th century, when more than half of the city's population consisted of either immigrants or first-generation Americans. Foremost among the city's institutions committed to helping these new Americans succeed was the Young Men's Christian Association (YMCA), the first American branch of which was established in Boston in 1851. The Boston YMCA began providing classes for its members in literature, history, music and numerous other subjects, which immediately drew large numbers of young men seeking to improve themselves. The Boston YMCA's academic programs grew and expanded,[2] leading to the incorporation in 1916 of Northeastern College of the Young Men's Christian Association, which ultimately became

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[2] Building on its early success, the YMCA began offering evening classes, which by 1898 included classes in its newly created Department of Law. In the early years of the twentieth century, the YMCA opened an Automobile School, a School of Law with the authority to award LLB degrees, and a School of Commerce and Finance for those interested in careers in business. The Evening Polytechnic School offered courses in art, architecture, navigation, surveying, mathematics and other subjects.

Northeastern University – fully separate from the YMCA – in 1935.[3]

Throughout its history, Northeastern has adhered to the approach laid out by its founder and first president, Frank Palmer Speare, who recognized in the constituency of the Boston YMCA "a vast market of working-class, sometimes older, often second-generation men and boys who hankered to take advantage of the American dream – the dream of moving ahead in an increasingly urban industrial society – but who were excluded by reason of birth and economics from the traditional education system." Antoinette Frederick, *Northeastern University, Coming of Age: The Ryder Years,* at 2 (1995)(hereafter "Frederick"). "Where traditional educational institutions tried to shape their markets by passing on traditional classical education, Speare looked instead at what was needed and tried to fulfill the needs of a market that increasingly demanded people with pragmatic, professional skills." *Id.* The result was Northeastern's "well-organized, systematic degree-granting professional programs, available

[3] Northeastern continued to expand throughout the twentieth century, adding a College of Liberal Arts in 1935 and, in subsequent decades, Colleges of Education, Pharmacy, Nursing, Criminal Justice and Computer Science, among many other new programs, as well as additional campuses in several Boston suburbs.

at minimum cost and easily accessible by public transportation in after-work hours." *Id.*[4]

Significantly, Speare and the other directors of the Boston YMCA

> were animated by more than Christian concern for the well-being of young men from rural and immigrant backgrounds. Through their ties to Boston's business community, they understood that the region faced a shortage of trained workers and [that the] new arrivals were needed to maintain economic expansion. The dual impulse to provide opportunities for students with few resources while working with industry to produce competent manpower was built into the foundations of Northeastern and became a defining characteristic of the school.

Richard M. Freeland [current President of Northeastern University], *Academia's Golden Age:*

[4] Speare's ideals have endured at Northeastern throughout its transformation to a modern research university: "What lies at the heart of the University is a commitment to devote our abilities and our resources to the tens of thousands of students – young and old, rich and poor, black and white, well-prepared academically or simply eager and ambitious to learn – who come to Northeastern in the hope and expectation of bettering themselves and their place in society through education." Northeastern University Annual Report, 1989-90, at 8.

Universities in Massachusetts, 1945-1970, at 33 (1992)(hereafter, "Freeland").

While Northeastern today is a major research university, its core mission continues to be to provide opportunities for diverse students, including those of modest means, to achieve professional success through practice-oriented education. This mission is reflected especially in Northeastern's focus on "cooperative" education – referring to the cooperation between university and employer – in which both undergraduate and graduate students alternate periods of classroom and laboratory work with periods of employment in positions related to their area of study. Indeed, what gives Northeastern a "special competence to provide professional education for [its] students" is "the University's unflagging adherence to the cooperative method." *Id.* at 165, 173 (quoting Kenneth G. Ryder, *The Uses of Knowledge, in A Decade of Progress, A Future of Promise, 1975-1985*, Northeastern University Tenth Anniversary Report 1985, at 4). Today, Northeastern annually places some 8,000 undergraduate and graduate students with upwards of 3,000 cooperating employers.

Northeastern's success in the field of practice-oriented education depends upon its ability – which means the ability of its students – to meet the needs of public and private employers. Those needs include the need for a diverse workforce.

2. Employers Require an Educated, Diverse Workforce.

As Professor Bok has observed, "every major profession in the United States has made known a desire for more diversity within its ranks." Bok, *supra*, at 4. The demand for greater diversity exists not only in the traditional professions, but across a broad spectrum of vocations, from bar associations and medical societies to automotive manufacturers, network newsrooms, and the sphere of presidential appointees in the federal government. *Id.* at 4-10.

The reasons the professions and other occupations demand diversity include, as just a few examples:

- the American Bar Association's conclusion that diversity on the bench and in the bar "will help make the legal profession more responsive to the needs of all segments" of society and will help to overcome the "widespread perception that the judicial system harbors an abiding racial bias";[5]

- the American Medical Association's conclusion that "a predominantly white (and increasingly Asian) profession cannot fully meet the health needs of a population

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[5] *Bok, supra*, at 5 (quoting Brief of the American Bar Association as *Amicus Curiae* at 11, *University of California* v. *Bakke*, 438 U.S. 265 (1978); Brief of the American Bar Association as *Amicus Curiae* at 16, *Grutter* v. *Bollinger*, 288 F.3d 732 (6th Cir. 2002)).

that is already almost one-quarter black and Hispanic," because "proper care requires not only technical skill but qualities of empathy and cultural awareness," including an understanding about "how different cultures perceive diseases";[6] and

- the conclusion of General Motors and numerous other large corporations that a diverse workforce, which includes diversity through the highest levels of management, is necessary for "American business [to] continue to create the world's most innovative products, manage the world's most productive workforces, and expand their operations across the globe."[7]

Northeastern University, as a practice-oriented university, is particularly attuned to the needs of the many different occupations that its students pursue. It has heard the demand of both public and private employers to develop a workforce that is itself diverse and that has the skills to deal with diversity in the workplace, and with a diverse consumer population.

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[6] *Id.* at 6-8 (citing, *inter alia*, *Diversity in Medical Education*, 15 Am. Med. Ass'n Bd. of Trustees Rep. at 2, 4 (1999); Gerard N. Burrow, *Medical Student Diversity – Elective or Required*, 73 Acad. Med. at 1052 (1998)).

[7] *Id.* at 9-10 (quoting Brief of General Motors Corporation as *Amicus Curiae* at 2, *Gratz* v. *Bollinger*, 122 F. Supp. 2d 811 (E.D. Mich. 2000), and citing Brief of 3M, Abbott Laboratories, American Airlines, *et al.*, as *Amici Curiae* at 10-11, in *Grutter* v. *Bollinger*, 288 F.3d 732 (6th Cir. 2002)).

Northeastern regularly receives entreaties from employers such as

- PricewaterhouseCoopers, the international accounting and consulting firm, which told Northeastern, "For us, diversity is a business imperative that will help us sustain our position as the leading global professional services firm";[8]

- Liberty Mutual, a Fortune 200 insurance company, which identified Northeastern as a "target school" for helping the company achieve its "mission ... to cultivate and encourage a career-long work environment that develops, retains and promotes a diverse work force";[9]

- the United States Department of Justice, Immigration and Naturalization Service, which requested the opportunity to come to Northeastern "to talk to minority students there and let them know about the different positions in the Immigration Service as well

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[8] Letter from Nancy Hennessey, Accounting Group, Northeastern University, to Patricia Venter, Minority Liaison for Co-op Education, Northeastern University (2003)(on file with recipient).

[9] E-mail from Christopher Duffy, Claims Manager at Liberty Mutual, to Patricia Venter, Minority Liaison for Co-op Education, Northeastern University (Oct. 23, 2001, 13:01 EST)(on file with recipient).

as let them know about the co-op program in Immigration";[10]

- the Commonwealth of Massachusetts Department of Environmental Protection, which contacted Northeastern to express its "concern[] with enhancing the diversity of [its] staff to include more persons of color, women, and the physically challenged";[11]

- The Nature Conservancy, which approached Northeastern about its "commit[ment] to diversity in the work place, with particular emphasis on areas in which minorities have been historically under-represented in the environmental professions";[12] and

- the Bedford, Massachusetts, Public Schools, which informed Northeastern it was "seeking to increase the diversity of its

[10] Letter from Rose Moses, Manager of Special Emphasis Program, United States Department of Justice, Immigration and Naturalization Service, to Patricia Venter, Minority Liaison for Co-op Education, Northeastern University (April 28, 1992)(on file with recipient).

[11] Letter from Arnold Sapenter, Director of Program Monitoring, Commonwealth of Massachusetts Department of Environmental Protection, to Patricia Venter, Minority Liaison for Co-op Education, Northeastern University (Jan. 13, 1997)(on file with recipient).

[12] Letter from Patti Reilly, Communications Associate, The Nature Conservancy, to Patricia Venter, Minority Liaison for Co-op Education, Northeastern University (Mar. 4, 1996)(on file with recipient).

faculties," and asked Northeastern to "encourag[e] minority graduates ... to consider a teaching career with the Bedford Public Schools".[13]

These are but a few examples of the numerous employers that actively recruit minority students at Northeastern.

3. Northeastern University Is Meeting Employers' Needs for an Educated, Diverse Workforce.

Perhaps the best example of a profession that requires a diverse workforce, and that looks to Northeastern to help produce qualified candidates for that workforce, is urban policing. Northeastern University has a preeminent College of Criminal Justice, which was established in the 1960s to prepare students for careers in law enforcement, corrections, legal studies, private security, and a host of related areas at all levels of the criminal justice system. Frederick, *supra*, at 151. One important employer for graduates of the College of Criminal Justice, indeed an employer whose hiring needs contributed directly to the creation of the College,[14] is the City of

[13] Letter from Joseph Buckley, Jr., Superintendent of Schools, Bedford Public Schools, to Patricia Venter, Minority Liaison for Co-op Education, Northeastern University (Jan. 21, 1997)(on file with recipient).

[14] Northeastern had conducted continuing-education courses for the Boston Police Department since the late 1950s. By the mid-1960s, the Department was lobbying for the creation of a

(continued...)

Boston Police Department, which actively seeks qualified minority applicants for a number of reasons.

Foremost among these reasons is the Department's conclusion that a meaningful minority presence in the Department is essential to its nationally renowned community policing strategy, which involves active collaboration among law enforcement, neighborhood residents, clergy, business leaders and other members of the local community. *Cotter* v. *City of Boston*, 193 F. Supp. 2d 323, 340-41 (D. Mass. 2002). In response to an upsurge in youth violence in Boston in the early 1990s, "community leaders and public officials in Boston began to implement a number of innovative reforms that together came to be known as the 'Boston Model' or 'Boston Strategy,'" the underlying philosophy of which was community oriented policing. Jack McDevitt, *A Survey of the Role of Racial and Ethnic Diversity in Leadership of the Boston Police Department*, 8-9 (July 12, 2001) (hereafter, "McDevitt") (cited in *Cotter v. City of Boston*, *supra*).

> [T]he Boston Strategy stressed the importance of partnerships between the

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(continued...)

comprehensive facility for criminal justice education. Northeastern assembled a plan for such a college and was able to open its new College of Criminal Justice in 1967. Freeland, *supra*, at 262.

> police, community groups, private organizations and other public agencies. ... Essentially, the model necessitates that the police and community work with one another in solving not only crime problems but also other quality of life concerns.

Id. at 13.

The Boston Police Department "insists that the success of community policing depends on the ability of the Department to garner the trust of the citizens it serves," and that a "critical component" of developing that trust "is ensuring diversity among the ranks of the Department." *Cotter* v. *City of Boston*, 193 F. Supp. 2d at 341 (quoting the Declaration of Boston Police Commissioner Paul Evans, Docket No. 96, at 5). Boston is hardly alone in this view. A survey of police chiefs in the 50 largest cities in the United States, conducted by the Center for Criminal Justice Policy Research at Northeastern's College of Criminal Justice, revealed that

- 96% of the respondents identified "partnerships between community organizations and the police" as being "extremely important";

- 98% indicated "that it was important to the success of Community Policing to have racial and ethnic diversity among those at each level of a police department, [including] line officers, supervisors, managers, and command staff"; and

- fully 100% "indicated that racial and/or ethnic diversity among members of the police force" was among the "important elements of a successful Community Policing effort ...."

McDevitt, *supra*, at 17, 22.

The results of the Boston Strategy, by any measure, "have been phenomenal." *Cotter v. City of Boston*, 193 F. Supp. 2d at 341. Not only have crime rates in the City of Boston declined dramatically, but the City also has appreciated a marked decrease in community complaints about the police, and a corresponding increase in the level of trust in the criminal justice system. McDevitt, *supra*, at 15, 19.

The "phenomenal" success of community policing is but one example of the "compelling public safety concerns" that courts have found sufficient to justify the appropriately tailored consideration of race in the field of criminal justice. *Reynolds* v. *City of Chicago*, 296 F.3d 524, 530 (7th Cir. 2002)(citing *Wittmer* v. *Peters*, 87 F.3d 916, 920-21 (7th Cir. 1996); *Barhold* v. *Rodriquez*, 863 F.2d 233, 238 (2d Cir. 1988); *Talbert* v. *City of Richmond*, 648 F.2d 925, 928-32 (4th Cir. 1981); *Detroit Police Officers' Ass'n* v. *Young*, 608 F.2d 671, 695-96 (6th Cir. 1979)). The court in *Reynolds*, for example held that the City of Chicago's promotion of twenty black, Hispanic and female sergeants and lieutenants to the ranks of lieutenant and captain pursuant to an affirmative action plan did not violate the equal protection clause because the City demonstrated, *inter alia*, that "[e]ffective police

work, including the detection and apprehension of criminals, requires that the police have the trust of the community and they are more likely to have it if they have 'ambassadors' to the community of the same ethnicity".[15]

The Boston Police Department also must hire qualified minority applicants in order to remedy the effects of past discrimination by the Department. The court in *Cotter* v. *City of Boston*, *supra*, recently upheld the Department's use of racial preferences to promote three black candidates to sergeant on this basis. 193 F. Supp. 2d at 346 (noting "the many opinions of the First Circuit documenting the discrimination perpetrated in the past by the Boston Police Department against minorities") (collecting cases).[16]

Northeastern has played a direct role in helping the Department remedy that past discrimination. "In 1985, when the Boston Police Department decided under court order that it must expand its roster of minority officers, the

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[15] *See also Patrolmen's Benevolent Ass'n of the City of New York, Inc.* v. *City of New York*, 310 F.3d 43, 54 (2d Cir. 2002)("There may indeed be occasions where the race-conscious transfer of police officers is a constitutionally permissible means of improving law enforcement, whether as a long-term strategy to create a diverse police force ..., or as an immediate response to an emergency situation.").

[16] The court held that a second compelling interest that justified the use of racial preferences was the Department's interest in avoiding meritorious litigation by the minority candidates if it failed to make the promotions. *Cotter*, 193 F. Supp. 2d at 351.

College of Criminal Justice began to provide examination training to minorities through the [George Lewis] Ruffin Society," "an organization of minority criminal justice professionals dedicated to increasing minority leadership in the profession," for which the College was a host institution. Frederick, *supra*, at 154. Largely as a result of this training, "the number of minority officers on Boston's force jumped from two to sixty within a period of a few years." *Id.* at 155. Northeastern, "[q]uite literally" had helped "change[] the complexion of the force." *Id.* (quoting College of Criminal Justice Dean Norman Rosenblatt).

This is but one example of the unique role that higher education can play in remedying the effects of past discrimination. The university has a compelling interest in diversity not to correct its own past discrimination, but based upon past discrimination by employers whose needs it is Northeastern's mission, in part, to serve.[17] Simply put, employers like the Boston Police Department that need to increase minority hiring,

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[17] Another example of Northeastern's role in remedying the effects of past discrimination outside the University concerns the court-ordered desegregation of the Boston public schools in the 1970s. During Phase II of the court-ordered desegregation, U.S. District Judge W. Arthur Garrity, Jr., ordered twenty-one Boston-area colleges and universities to be paired with certain Boston public schools as part of the effort to improve the educational quality of those schools. Northeastern's leadership role in that pairing program supplemented Northeastern's pre-existing experience with the Boston public schools and led to a wide range of other new programs and initiatives for students in those schools. Frederick, *supra*, at 185, 186-89, 192-95.

either in response to a court order or to avoid one, have a compelling need for qualified applicants – a need that cannot be filled unless universities first admit, retain, prepare and graduate minority students who are ready to become those qualified applicants.

B. The Benefits of Diversity Are Essential to the Educational Experience that Northeastern University Provides.

Northeastern University does not champion diversity only in order to produce qualified minority candidates for the employers it serves. A racially and ethnically diverse student body also is essential to the educational experience that it is Northeastern's mission to provide. Northeastern's graduates of every race and color are better leaders and workers because they have received their education in an environment of diversity.

The conclusion that diversity in higher education produces dramatic educational benefits has ample empirical proof, as the respondents demonstrated below. *Gratz* v. *Bollinger*, 122 F. Supp. 2d 811, 822 (E.D. Mich. 2000)("The University Defendants have presented this Court with solid evidence regarding the educational benefits that flow from a racially and ethnically diverse student body."). It also is a conclusion that the petitioners and their *amici* effectively concede. *Id.* at 823 ("Plaintiffs have presented no argument or evidence rebutting the University Defendants' assertion that a racially and ethnically diverse student body gives rise to educational benefits for both minority and non-

minority students. In fact, during oral argument, counsel for Plaintiffs indicated his willingness to assume, for purposes of these motions, that diversity in institutions of higher education is "good, important and valuable."); *see also* Petitioners' Brief at 40 ("It certainly can be assumed that remedying the lingering effects of societal discrimination would produce benefits both in the educational system and throughout society generally."); Brief of United States as *Amicus Curiae* at 13-14 (describing the goal of diversity in education as "important and laudable").

For Northeastern University, the educational benefits of diversity are so compelling that diversity must be regarded not simply as a means of enhancing the education that the University provides, but as essential to the educational experience itself.[18] Because of the benefits that flow directly from diversity in the classroom, the consideration of race or ethnicity

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[18] Of all the noble ideals that a university can teach, none are more vital to our democracy than those of tolerance, inclusion and the free exchange of ideas. ... [The university] must bring to its campus students and faculty as diverse as the world from which they are drawn. It must promote civil discussion of differences and provide opportunities for the practice of cooperation and tolerance. It must demonstrate through its course offerings an unwavering respect for the world's multitude of cultures.

Inauguration Speech of Northeastern University President John A. Curry (December 1, 1989)(*quoted in* Karen Feldscher, *Northeastern University, 1989-1996: The Curry Years: Smaller but Better,* 151-52 (2000)).

in admissions is not for the purpose of determining who should have access to the educational opportunity at Northeastern. Rather, it is for the purpose of creating the educational opportunity that Northeastern wishes to provide in the first place. *See* State of the University Address of Northeastern President Richard M. Freeland, September 30, 1996, *available at* http://www.president.neu.edu/speeches/university960930.html (describing diversity "as a central element of [Northeastern's] institutional character").

As Justice Powell recognized in *Bakke*, the very essence of higher education is the vibrant exchange of information, ideas and viewpoints among faculty and students, and – as importantly – among the students themselves.

> "[A] great deal of learning [in higher education] occurs informally. It occurs through interactions among students of both sexes; of different races, religions and backgrounds ...who have a wide variety of interests, talents, and perspectives; and who are able, directly or indirectly, to learn from their differences and to stimulate one another to reexamine even their most deeply held assumptions about themselves and their world. ...
>
> "... For many, ... the unplanned, casual encounters with roommates, fellow sufferers in organic chemistry class, student workers in the library, teammates on the basketball squad, or

> other participants in class affairs or student government can be subtle and yet powerful sources of improved understanding and personal growth."

Bakke, 438 U.S. at 312-13 n.48 (Powell, J.)(quoting William Bowen, *Admissions and the Relevance of Race*, Princeton Alumni Weekly 7, 9 (Sept. 26, 1977)). In short, what students ultimately learn in higher education cannot be divorced from the question of who is present when the learning takes place.

Based on its own experience, including its interactions with employers from the professions and all occupations, Northeastern knows that students who learn in an environment that is racially and ethnically diverse are more comfortable with the free exchange of ideas than those who learn in an environment of homogeneity; that students educated in a diverse environment absorb the values of tolerance and inclusion; and that these values translate directly into character attributes that foster success in the workplace, which is itself a collection of diverse co-workers, supervisors, customers, vendors, competitors, and consumers.

> We expand our understanding of excellence when we can more thoughtfully identify those skills, values and attributes that are needed to do the work that [the professions] are hiring people to do. Though it is easier to rely on traditional criteria such as class rank ...: and the ranking of the institutions students attend[, w]e

> have to admit that these are merely surrogates for the real outcomes we are seeking.

David Hall [Professor, Northeastern University School of Law, former Senior Vice President for Academic Affairs and Provost and former Dean of the School of Law at Northeastern University], Diversity in Excellence: Expanding our Understanding of Excellence (speech to The Boston Lawyers Group, Hiring and Education Committee Spring Forum, May 15, 2002).

Northeastern thus does not seek diversity in a compromise with individual qualifications, but rather as integral to the overall qualifications of each incoming class. Northeastern does not seek diversity at the expense of academic excellence, but promotes diversity in order to attain excellence. Without a diverse student body, Northeastern cannot achieve the educational excellence that it strives to attain, and cannot provide its students – *any* of them – with the practice-oriented education that is its mission to provide.

II. NORTHEASTERN UNIVERSITY MUST NOT FORFEIT ITS ABILITY TO DEFINE AND TO PURSUE ITS OWN EDUCATIONAL MISSION.

This Court long has recognized the vital role of education in a free society, and the "constitutional importance of academic freedom." *Board of Regents of the Univ. of Wisconsin System* v. *Southworth*, 529 U.S. 217, 238 n.3

(2000)(Souter, J., concurring)(collecting authorities).

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.

Sweezy v. *New Hampshire*, 354 U.S. 234, 250 (1957). Thus, it is essential that the university be able "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Id.* at 263 (Frankfurter, J., concurring). *See also Bakke*, 438 U.S. at 312 (Powell, J.)(reaffirming that "Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment," and that a university's "freedom ... to make its own judgments as to education includes the selection of its student body") (citing *Sweezy*, 354 U.S. at 263).

For these principles to have meaning, the individual university must not lose the ability "to define its own mission." *Board of Regents of the Univ. of Wisconsin System* v. *Southworth*, 529 U.S. at 238 (Souter, J., concurring). Northeastern University has defined its mission, and diversity is essential to it. Northeastern must be able to ensure the racial and ethnic diversity of its student body in order to provide each of its

students with the benefits of an education informed by a diverse environment, and in order to provide future employers with a pool of talented workers and leaders instilled with the breadth of character required for success.

CONCLUSION

Northeastern University, like other institutions of higher education, prepares students to flourish in the society of the future. In America, that society must be one that ever more completely fulfills our national promise of equal opportunity for all. This goal can only be achieved if our workforce, across the full range of professions, is diverse and inclusive. Northeastern's historic focus upon preparing students for the professions through its flagship program of cooperative education implies, therefore, a particular need to enroll, educate and graduate a diverse student body. Affirmative action policies that consider race among a number of criteria in the admissions process are essential to the achievement of that mission.

Accordingly, the Court should affirm the judgment of the district court, and affirm that the appropriately tailored use of racial or ethnic preferences in student admissions does not violate the Equal Protection Clause of the 14th Amendment, Title VI of the Civil Rights Act of 1964, or 42 U.S.C. § 1981.

Respectfully submitted,

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